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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. BILLY JOE GIDDINGS, Defendant and Appellant.	A152397 (Humboldt County Super. Ct. No. CR1502203A)

Appellant Billy Joe Giddings shot and killed Trevor Mark Harrison during a drug deal that went awry and then pointed his semiautomatic firearm at four remaining individuals before fleeing. A jury convicted Giddings of one count of second-degree murder (Pen. Code, § 187,) with an enhancement for discharging a firearm (Pen. Code § 12022.53, subd. (d),), and four counts of assault with a semi-automatic firearm (Pen. Code, § 245, subd. (b)).[1] The same jury also acquitted a co-defendant of all charges.

On appeal, Giddings argues error on five grounds, three going to his convictions and two going to his sentence. First, Giddings mounts a sufficiency of the evidence attack on one of his four convictions for assault with a semiautomatic firearm. Second, Giddings claims he was entitled to a pinpoint self-defense instruction concerning his quickness to react because he had been a victim of a past assault. Third, Giddings contends the implied malice jury instruction removed malice from jury consideration by mistakenly suggesting that implied malice could be based on the dangerous act alone.

[1] All further references are to the Penal Code unless otherwise specified.

Fourth, Giddings claims section 654 precluded the imposition of consecutive sentences for his four convictions for assault with a semiautomatic firearm. Fifth, Giddings requests a remand for resentencing in accordance with amended section 12022.53. We affirm the convictions and reject the section 654 argument, but remand for resentencing to permit the trial court to exercise its discretion under section 12022.53.

I. BACKGROUND

A. The Setting

Four people present at the shooting testified about the events of May 9, 2015, the day it took place: Giddings, Kay Haug, Demian Starlight, and Kenneth Eskridge. The shooting occurred at Haug's home, where her caregiver Starlight also lived, and where Haug's friend Eskridge was temporarily staying. The testimony from these four individuals is mostly consistent up until just before the shooting, when Giddings's testimony diverges from the others who testified.

Giddings slept at Kim Steele's home the night before the shooting after the friend he had accompanied to Steele's home left without him. The next morning, Steele gave Giddings a ride to Eureka, where Giddings met up with co-defendant Robert Luis Huntzinger. Steele then dropped off Giddings and Huntzinger at Huntzinger's home. The two men planned to meet Steele later to sell marijuana. In anticipation of the sale, Huntzinger picked up a duffel bag with marijuana in it. Giddings already had a pound of marijuana and his gun with him in his backpack.

B. The First and Second Visits to Haug's Home

Huntzinger and Giddings hung out for a while at a gas station before meeting Steele at a hotel. Together with Steele, they drove to Haug's home in Arcata to sell marijuana. Steele claimed she could get $1,900 for Giddings's pound of marijuana. While en route, Steele told Giddings that the people to whom she was selling his marijuana did not want to meet anyone. Giddings also was uninterested in meeting the buyers. When they arrived, Giddings gave Steele his marijuana and waited in the backseat of the car while Steele and Huntzinger went into the house.

Inside, Haug weighed Giddings's marijuana and discovered it was less than the agreed upon weight of one pound. Haug declined to buy the marijuana but, in an apparent attempt to parlay the situation into a bigger deal, told Huntzinger and Steele she could probably buy four pounds of the same marijuana if they brought it over to her home. Steele and Huntzinger returned to the car with Giddings's marijuana. Starlight and Eskridge, who were both staying at Haug's home at the time, were not present for this initial interaction.

A few hours later, Steele, Huntzinger, and Giddings returned to Haug's home to try to sell Huntzinger's marijuana. Giddings again remained in the car, this time with his marijuana, while Steele and Huntzinger went inside. Negotiations took place in Haug's living room, where Eskridge was sitting. Starlight, who was nearby cleaning dishes in the kitchen, could also see and hear the negotiations as the kitchen and living room were only separated by a half wall.

Haug again declined to buy, this time because the proffered goods were not up to her standards. Before Steele and Huntzinger left, Haug offered to buy some trim. Huntzinger appeared disgruntled and in a hurry to leave. Huntzinger and Steele slammed Haug's door as they left.

C. The Third Visit to Haug's Home

Steele, Huntzinger, and Giddings drove to Huntzinger's home before returning to Haug's home a third time. This time, Giddings wanted to speak with Haug because she had only seemed interested in his marijuana. He figured he could make a deal happen because he could get more pounds of marijuana like the one Steele had showed Haug earlier on his behalf. Giddings also wanted to tell Haug that he had personally bagged the marijuana and would not have bagged up less than a pound. Giddings decided to bring his gun with him into Haug's home because he "didn't know these people."

They arrived at Haug's house in the late evening. Steele and Giddings approached Haug's front door first, while Huntzinger got his duffle bag of marijuana out of the trunk. Steele, who was carrying a bag of trim, knocked and said, "it's Kim."

Trevor Harrison, Haug's son who had come over to Haug's home earlier that afternoon, answered the door and let in Steele and Giddings. Haug, Starlight, and Eskridge were sitting in the living room. Steele joined them, while Giddings remained standing near the front door. Haug inspected the bag of trim that Steele had brought and once again declined to buy because of poor quality. She also told Steele that she should not bring anyone else over.

D. Fallout from Deal Gone Awry

At this point, the testimony given by Haug, Starlight, and Eskridge diverges from Giddings's testimony. According to Haug, Starlight, and Eskridge, Giddings pulled his gun out of his pocket. While the half wall dividing the kitchen and living room blocked much of Starlight's view, Haug and Eskridge saw that someone was trying to enter through the front door. Harrison, who had been in the kitchen, tried to keep the front door shut to prevent the person from entering. Harrison was not holding anything as he tried to do so. Giddings told Harrison to get away from the door. Giddings then fired his gun twice, hitting Harrison once in the shoulder.[2] Harrison backed up into the kitchen, slumped over, and fell to the floor.

Giddings tried to minimize the shooting by saying he had only shot Harrison in the shoulder with a .22 caliber gun. Haug and Starlight testified that Giddings next pointed his gun at them as well as Eskridge and Steele, who were all in the living room. Giddings told them to keep their heads down, sit down, and shut up. Haug also testified that Giddings held a gun to Eskridge's head.

Eskridge's testimony was similar but varied on certain points from the version recounted by Haug and Starlight. Eskridge first testified that he "freaked out" after the shooting and said out loud that they needed to call an ambulance or the police. Giddings responded by holding a gun to his head and telling him, "Sit down. Shut up. Don't look at my face." For the next few minutes, Giddings also pointed the gun at Haug and Starlight, but not at Steele because, according to Eskridge, there "wouldn't be any reason

[2] The second shot created a bullet hole in the front door.

for him to do that." Later, Eskridge conceded that he had told officers the morning after the shooting that Giddings had pointed his gun at Steele and that she was "scared shitless" based on her "vocalizations."

Meanwhile, Haug, Starlight, and Eskridge testified that Huntzinger had walked in through Haug's front door with a duffle bag and had headed directly to the two bedrooms in the back of Haug's home. Haug, Starlight, and Eskridge could hear Huntzinger rummaging and opening and closing drawers in the bedrooms. Huntzinger returned to the living room five minutes later and left immediately with Giddings.

Giddings's testimony differs markedly from that of Haug, Starlight, and Eskridge. As with other marijuana transactions, Giddings admitted that he was carrying his gun in his hoodie pocket when he entered Haug's home with Steele. Giddings testified that, as he went to sit down, "the door start[ed] opening and closing loud." With his gun out, Giddings walked around the half wall dividing the kitchen and living room. He saw Harrison, whom he identified as "the guy that let us in," "wrestling with the door." The door opened and closed five or six times in three or four seconds.

Giddings believed he saw a gun in Harrison's hand as he lifted it. Without thinking, Giddings pulled the trigger of his own gun twice. When asked what was going through his head at that point, Giddings responded, "Nothing. This all happened so fast. . . . [¶] [I]t was kind of like . . . if you're walking into the woods and a bee is about to sting you and you . . . try to swat the bee. You're not thinking . . . . about swatting it."

Giddings testified that Harrison fell to the floor within seconds after he fired the gun. Huntzinger opened the door and said, "What the fuck." Giddings responded, "I just shot this guy. We got to get out of here." Giddings recalled Haug saying, "You just shot my son." He testified that he never pointed his gun at anyone else and left immediately with Huntzinger. He did not wait for Steele because she was just looking at him without saying anything.

E. The Aftermath of the Shooting

After Giddings and Huntzinger left, Eskridge called 911, while Steele tended to Harrison. Rather than checking on Harrison, Haug and Starlight implemented a plan to

hide Haug's marijuana and a handgun Starlight[3] owned and kept hidden in Haug's home because they knew police were coming. Haug gathered and handed approximately 22 pounds of marijuana and the handgun to Starlight, who had jumped out a bedroom window. Starlight then hid the marijuana in a nearby shed and dumped the handgun in a ditch. This took about five minutes.

After helping Starlight hide the marijuana and gun, Haug went to tend to her son. Steele, who had been sitting next to Harrison, left. Meanwhile, Starlight waited outside until he knew police would not notice him leaving the area and then walked to his mother's house.

Police and paramedics arrived soon after Steele left. Haug, Eskridge, and Harrison were the only people still at Haug's home. Police found Harrison lying on his back on the floor; he was not breathing and had no pulse.

Harrison was later declared dead. An autopsy revealed that Harrison had died from a single gunshot that had entered from his left upper back and traveled through his heart and vital organs. A pathologist testified at trial that the bullet trajectory suggested Harrison was crouched down and facing the gun. Harrison's autopsy also showed that Harrison had high concentrations of methamphetamine and its metabolite, amphetamine in his blood stream, well within the "toxic" range. Haug also admitted on the stand that her son had a drug problem.

In addition, the prosecutor admitted a recorded jail call in which a female asked Giddings, "how come [Harrison] was shot in the back of the shoulder" if Giddings "shot [Harrison] in self-defense?" Without ever mentioning that Harrison was armed, Giddings responded that he was "closing the door."

F. Charges, Trial, and Verdict

In an amended information filed on January 11, 2017, Giddings was charged with eight counts. Count one charged him with the murder of Trevor Mark Harrison in

[3] Starlight explained that he kept a firearm in Haug's home because he was assaulted and nearly killed around Thanksgiving 2014.

violation of section 187 with a special allegation that he intentionally discharged a firearm causing great bodily injury or death to Harrison in violation of section 12022.53, subdivision (d). Count two alleged Giddings had committed first degree burglary of a building occupied by Kay Lynn Haug with a special allegation that he intentionally discharged a firearm, causing great bodily injury or death to Harrison in violation of section 12022.53, subdivision (d). Count three alleged that Giddings committed robbery with special allegation that he intentionally discharged a firearm, causing great bodily injury or death to Harrison in violation of section 12022.53, subdivision (d). Counts four through seven alleged Giddings assaulted Haug, Starlight, Eskridge, and Steele with a semiautomatic firearm. Count eight alleged Giddings had made criminal threats to Eskridge in violation of section 422 with the special allegation that he intentionally discharged a firearm which caused great bodily injury or death to Eskridge in violation of section 12022.53, subdivision (d). Huntzinger was also charged with murdering Harrison and first degree burglary in counts one and two, respectively.

On June 27, 2017, a jury convicted Giddings of the second-degree murder as well as four counts of assault with a semiautomatic firearm and acquitted him of the other charges. The same jury acquitted Huntzinger of all charges.

II. ANALYSIS

A. Substantial Evidence for Assaulting Steele With a Deadly Weapon

Giddings contends that his conviction for assaulting Steele with a semi-automatic firearm is unsupported by substantial evidence that his actions were directed at Steele. According to Giddings, the jury's verdicts finding him not guilty of burglary and robbery prove that the jury "disagreed with [the] prosecution theory that [he] held the occupants [including Steele] at bay while Huntzinger ransacked Haug's premises." Moreover, Giddings contends that Eskridge, the only person who testified about whether he pointed a gun specifically at Steele, said that Giddings did not do so.

"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable,

credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) Our role in assessing a sufficiency of evidence claim is therefore accurately described as "a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Section 245, subdivision (b), prohibits individuals from assaulting another person with a semiautomatic firearm. To prove a section 245, subdivision (b), violation, the prosecution must establish the following elements: "1. The defendant did an act with a semiautomatic pistol that by its nature would directly and probably result in the application of force to a person; 2. The defendant did that act willfully; 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; AND 4. When the defendant acted, he had the present ability to apply force with a semiautomatic firearm to a person." (CALCRIM No. 875.) As Giddings does not contest that his firearm was a semiautomatic on appeal, we only address whether the evidence establishes that an assault with his firearm occurred.

Assault is a general intent crime and does not require proof that Giddings specifically intended to injure the victim. (*People v. Williams* (2001) 26 Cal.4th 779, 788; *People v. Colantuono* (1994) 7 Cal.4th 206, 215–216.) Accordingly, "assault [only] requires actual knowledge of the facts sufficient to establish that the defendant's act by its nature will probably and directly result in injury to another." (*Williams,* at p. 782.) Pointing a gun at another person is an act that will probably and directly result in injury to another person. (*People v. Raviart* (2001) 93 Cal.App.4th 258, 263 (*Raviart*).) But a defendant can assault a person with a firearm without directly pointing it at the other person. (*Ibid.*) For example, in *Raviart*, the defendant was convicted of two counts of assault with a firearm on a peace officer, after a confrontation with two police officers in which he pointed his gun at only one of the two officers. (*Id.* at pp. 261, 266–267.) The Court of Appeal affirmed the trial court's judgment and gave three examples of cases, illustrating its holding that, to prove an assault with a firearm, it need not be

demonstrated that the assailant pointed his or her gun directly at the other person. (*Id.* at pp. 263–267.)

This principle can be traced back to the earliest era of California law. In *People v. McMakin* (1857) 8 Cal. 547 (*McMakin*), the defendant was convicted of assault with a deadly weapon after he pointed a pistol at a trespasser, "but with the instrument so pointed that the ball would strike the ground before it reached the witness, had the pistol been discharged." (*Id.* at p. 547.) The Supreme Court affirmed the defendant's conviction for assault, holding that an assault may be committed by simply "*presenting* a gun at a person who is within its range" or "any other similar act, accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of using actual violence against the person of another, will be considered an assault." (*Id.* at p. 548, italics added.) Simply put, the drawing of a gun is evidence of an intention to use it. (*Id.* at p. 549.)

In *People v. Hunter* (1925) 71 Cal.App. 315, the defendant tried to pull a pistol from his sock to shoot his wife, who leapt out of a window before he could do so. (*Id.* at pp. 317–318.) On appeal, he argued that the evidence was "insufficient to prove the alleged assault in that it does not show that the defendant attempted to use the weapon." (*Id.* at p. 318.) The Court of Appeal affirmed Hunter's conviction, holding that "[t]he evidence is ample to show that the defendant had the intention and the present ability to kill his wife. The only question remaining is whether he attempted to carry his purpose into execution. To accomplish that purpose, it was necessary for him to take the gun from his sock, to point it at his wife, and to pull the trigger. *Any one of these would constitute an overt act toward the immediate accomplishment of the intended crime*." (*Id.* at p. 319, italics added.)

Finally, in *People v. Thompson* (1949) 93 Cal.App.2d 780, the defendant removed a loaded revolver from a chest of drawers and pointed the gun in between two sheriff's deputies and downward, while ordering them to raise their hands. (*Id.* at pp. 781–782.) The Court of Appeal affirmed the conviction on two counts of assault with a deadly weapon, explaining that "[w]hile [the defendant] did not point the gun directly at . . .

either of them, it was in a position to be used instantly." (*Id.* at p. 782.) The Court of Appeal further noted that "the implied threat was that [the defendant] would shoot if the officers did not raise their hands, [as] [the defendant] was demanding immediate compliance." (*Ibid*.)

Here, two witnesses testified that Giddings pointed his gun at Haug, Starlight, Eskridge, *and* Steele. Pointing a gun generally at all four individuals alone sufficed for the jury to find Giddings guilty of assaulting Steele with a firearm even if he did not directly aim his gun at her. (See *Raviart*, *supra*, 93 Cal.App.4th at p. 267.) In fact, by waiving around his semiautomatic gun, Giddings created a "zone of harm" affecting multiple assault victims simultaneously. (*People v. Trujillo* (2010) 181 Cal.App.4th 1344, 1354–1357.) Giddings's ability to inflict actual violence using his firearm coupled with his demands that all four people comply with his orders to keep their heads down, sit down, and shut up denoted Giddings's intention at that time and thus also constituted an assault. (*McMakin*, *supra*, 8 Cal. at p. 549.) And even if these actions were somehow insufficient to prove assault of a firearm against all four victims, Giddings also held his gun to Eskridge's head. In doing so, Giddings made clear his willingness to use his gun against everyone present, including Steele, if they failed to comply with his orders. This, too, sufficed to prove Giddings also assaulted Steele. (*People v. Thompson*, *supra*, 93 Cal.App.2d at pp. 781–782.)

Giddings counters Eskridge initially testified that he had no reason to point his gun at Steele. But "a trier of fact is permitted to credit some portions of a witness's testimony, and not credit others." (*People v. Williams* (1992) 4 Cal.4th 354, 364.) The jury could have chosen instead to credit Eskridge's later testimony that Steele was "scared shitless" when Giddings pointed his gun at everyone in Haug's living room. After all, Eskridge's later testimony aligns with Haug's and Starlight's testimony that Giddings pointed his firearm at everyone in Haug's living room, including Steele.

Giddings alternatively contends that the jury's acquittal on charges of burglary, robbery, and criminal threats meant that Giddings did not assault Steele when he generally waived a gun around after shooting Harrison. But we are not allowed to so

speculate because our review is confined to " 'whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt.' " (*People v. Lewis* (2001) 25 Cal.4th 610, 656.) Our review is accordingly " 'independent of the jury's determination that evidence on another count was insufficient.' " (*Ibid.*; see also *People v. Price* (2017) 8 Cal.App.5th 409, 452–453.) Such independent review recognizes that such "[a]n inconsistency may show no more than jury lenity, compromise, or mistake, none of which undermines the validity of a verdict." (*People v. Lewis*, *supra*, 25 Cal.4th at p. 656.) As discussed, our review confirms that the record contains substantial evidence that Giddings assaulted Steele as well as Haug, Starlight, and Eskridge. We therefore decline Giddings's invitation to speculate about the jury's split verdict.

Accordingly, we conclude there is substantial evidence supporting Giddings's conviction for assaulting Steele with a firearm when the evidence is viewed in the light most favorable to the judgment even though Eskridge's testimony was inconsistent. (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 27.)

B. Pinpoint Instruction on Antecedent Threats or Assaults

Giddings claims the trial court erroneously declined his request "to instruct the jury that a defendant who has suffered a deadly assault in the past is prone to react quickly when again presented by an assault in similar conditions." "On appeal, we apply a de novo standard of review." (*People v. Manriquez* (2005) 37 Cal.4th 547, 581, citing *People v. Waidla* (2000) 22 Cal.4th 690, 733.)

1. Additional Background

Giddings's request for a pinpoint instruction concerning his proclivity to react quickly was based on his testimony that he began carrying a gun to all marijuana transactions after he was stabbed and robbed of his marijuana in August 2012. He brought his gun to this transaction because he did not know the people with whom he was transacting. Giddings said this was the first time that he had pulled the gun out during a marijuana transaction.

Based on his experience of being "stabbed during . . . a marijuana deal similar in nature," Giddings claimed he was more prone to react quickly. He therefore requested a pinpoint jury instruction on self-defense that " '[s]omeone who has been threatened or harmed by a person in the past, is justified in acting more quickly.' " After hearing argument, the trial court explained that "the law is such that under these facts it doesn't support an instruction sought by Mr. Giddings . . . based on his testimony sometime in the past [he was] . . . the victim of violence during a marijuana deal . . . ." It therefore denied Giddings's request.

2. Analysis

" 'A trial court must instruct on the *law* applicable to the facts of the case' " (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1244, original italics, abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216), and " 'in appropriate circumstances[,]' a trial court may be required to give a requested jury instruction that pinpoints a defense theory of the case . . . . [Citations.] But a trial court need not give a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions [citation], or is not supported by substantial evidence [citation]." (*People v. Bolden* (2002) 29 Cal.4th 515, 558.)

If a defendant asserts self-defense and admits evidence of threats by the victim or those associated with the victim to support the reasonableness of his perceptions and resulting beliefs, the defendant is "entitled to an instruction on the effect of antecedent threats or assaults *by the victim* on the reasonableness of defendant's conduct." (*People v. Gonzales* (1992) 8 Cal.App.4th 1658, 1663–1664, italics added (*Gonzales*).) The right to such an instruction is based on the " 'common sense notion' " that a person previously threatened or assaulted by another may reasonably " 'be on heightened alert upon encountering that threatener, and [will] reasonably take [prior threats] into account in deciding the necessity for, and the amount of, defensive action, in response to any act on the part of the threatener reasonably appearing to be calculated to carry out that threat.' " (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065 (*Minifie*).) In other words, a jury instruction is warranted because "[t]he jury must evaluate such perceptions in context,

i.e., the 'same or similar circumstances' as those in which the defendant acted" (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1094), as such evidence " 'corroborate[s] [a defendant's] testimony that he was in fear for his life by proving the reasonableness of such fear.' " (*People v. Davis* (1965) 63 Cal.2d 648, 656.)

For example, in *Minifie, supra*,13 Cal.4th 1055, our high court agreed that a defendant was entitled to admission of evidence of past threats associated with the victim or the victim's associates to corroborate whether that defendant acted reasonably based on the how "the situation appeared to the *defendant*, not the victim." (*Id.* at p. 1068.) In that case, the defendant entered a bar where the victim was sitting. (*Id.* at p. 1060.) The victim did not know but was familiar with the defendant because the victim was friends with a person whom the defendant had killed. (*Ibid.*) The defendant and the victim approached each other and spoke briefly. (*Id.* at pp. 1060–1061.) After the victim punched the defendant in the face, the defendant pulled out a gun and shot the victim in the hand. (*Id.* at p. 1061.) At trial, the defendant proffered evidence that the family and friends of the person whom he had killed had directly and indirectly threatened him and that those family and friends also had a reputation for threats and violence. (*Id.* at pp. 1061–1062.) The trial court excluded the proffered evidence. (*Id.* at p. 1063.)

Our high court held that the trial court in *Minifie* erred. In reaching its decision, it explained that self-defense is "determined from the point of view of a reasonable person in the defendant's position." (*Minifie*, *supra*, 13 Cal.4th at p. 1065.) The test for admitting evidence that the victim's friends and family had threatened the defendant was therefore "not whether the victim adopted the third party threats, but whether the defendant reasonably associated the victim with those threats." (*Id.* at p. 1068.) It then held that the evidence proffered by the defendant in *Minifie* was admissible because " 'threats from a family and its friends may color a person's perceptions of that group no less than threats from an individual may color a person's perceptions of that individual. A defendant who testifies that he acted from fear of a clan united against him is entitled to corroborate that testimony with evidence "tend[ing] in reason to prove" that the fear was reasonable.' " (*Id.* at pp. 1065–1066.)

Here, Giddings requested a pinpoint jury instruction that " '[s]omeone who has been threatened or harmed by a person in the past, is justified in acting more quickly,' " to support his claim of self-defense. But unlike *Minifie,* he did not proffer evidence that Harrison or any of the assault victims at Haug's home had been involved in the past marijuana transaction during which he was stabbed and robbed, giving him reason to believe, as was the case with the defendant in *Minifie,* that his victims carried a grudge against him and thus presented a threat. (*Minifie*, *supra*, 13 Cal.4th at pp. 1061–1062.) In fact, Giddings testified that he did not know the people at Haug's home. And he never mentioned that he was threatened by someone he associated with anyone in Haug's home that evening. Accordingly, Giddings was not entitled to his requested instruction because he was not reasonably on heightened alert based on prior threats from anyone present in Haug's home. (*Minifie*, *supra*, at p. 1065.) We decline to endorse the idea that a drug-dealer who has a history of placing himself in mortal danger due to his own criminality is entitled, in effect, to a "trigger finger" enhancement to standard self-defense instructions. That is not the law, nor should it be for self-evident policy reasons having to do with public safety.

Nevertheless, Giddings claims *Gonzales*, *supra,* 8 Cal.App.4th 1658, supports his position that he is entitled to his requested pinpoint instruction because he was stabbed and robbed during another marijuana transaction. In that case, the defendant sold a small quantity of heroin to an undercover officer. (*Gonzales*, *supra*, at p. 1661.) A few minutes later, "police officers at the front door gave an appropriate knock notice and then smashed in the door when they heard people running inside." (*Ibid.*) When they opened the door, the defendant had a rifle raised to his cheek and shot at the two officers. (*Ibid.*) The defendant later claimed that he fired his rifle in self-defense because he mistakenly thought the police "were robbers such as those who [had] broke[n] down his door and beat[en] and robbed him at gunpoint three days earlier." (*Id.* at pp. 1660, 1661.)

At trial, the defendant requested but the trial court declined to give the following instruction: "One who has been previously physically assaulted by another person is justified in acting more quickly and taking harsher measures for his own protection in the

event of an actual or threatened assault that [*sic*] would be a person who had not received such prior assaults. If in this case you believe from the evidence that individuals in a similar situation previously assaulted the defendant and that the defendant, because of such prior assaults had reasonable cause to fear greater peril in the event of an altercation with these same individuals than he would have otherwise, you must take such prior assaults into consideration in determining whether the defendant acted in a manner in which a reasonable person would act in protecting his own life or bodily safety." (*Gonzales, supra,* 8 Cal.App.4th at p. 1663.)

The Court of Appeal later reviewed the requested jury instruction and "disagree[d] with [the defendant's] contention of prejudicial error because the court had no duty to give an incomplete and misleading instruction and because error, if any, was harmless." (*Gonzales, supra,* 8 Cal.App.4th at p. 1663.) It acknowledged that "a defendant asserting self-defense is entitled to an instruction on the effect of antecedent threats or assaults *by the victim* on the reasonableness of defendant's conduct." (*Id.* at pp. 1663–1664.) But it concluded that the instruction was misleading because it "could be read to state that an individual who has been previously assaulted is justified in taking harsher measures for his own protection *as to all the world* than would a person who had not been so assaulted." (*Id.* at p. 1664.)

Despite the fact that the holding in *Gonzales* actually cuts against his argument here, Giddings insists the case helps him, pointing to the separate opinion of a concurring justice who was "satisfied [that] the rationale . . . support[ing] the 'once bitten, twice shy' instruction . . . applies equally to law abiding persons who react to what appears to be a surprise violent assault under circumstances similar to an earlier one in which they suffered actual or threats of substantial bodily harm." (*Gonzales, supra,* 8 Cal.App.4th at p. 1665.) Even if the *Gonzales* concurrence does shed some light on what the law might be in an appropriate case, Giddings, like Gonzales, can hardly lay claim to fear from past experience as a "law abiding person[]," and thus he is no more entitled to a pinpoint instruction on heightened fear than Gonzales was. (*Ibid.*)

C. Implied Malice Instruction

Giddings next contends that the CALCRIM No. 520 instruction, which authorizes the jury to find that implied malice exists where a criminal defendant intentionally performs an inherently dangerous act, removed malice from jury consideration. He further submits that this instruction permitted the jury to find him guilty of second degree murder without finding that he acted with implied malice because the "the implied malice doctrine is not meant to apply where the dangerous act merges with the offense itself." Rather, Giddings claims that there must instead be an act independent of the assaultive conduct to support application of the dangerous act implied malice doctrine. He concludes the trial court's instruction and counsel's argument that "the 'act' of shooting a gun sufficed for a finding of second degree murder was thus error."

1. Additional Background

Here, the trial court instructed the jury on the elements of murder, the definition of malice aforethought, and the additional findings necessary to find Giddings guilty of first-degree murder under either a premeditation or felony-murder theory.

With respect to elements for murder, the trial court instructed the prosecution was required to prove that (1) Giddings "committed an act that caused the death of another person;" and (2) when Giddings "acted, he had a state of mind called malice aforethought."

The trial court next defined malice aforethought as "a mental state that must be formed before the act that causes death is committed." It explained that malice aforethought could either be express or implied. To find Giddings acted with express malice, the court stated that Giddings must have "unlawfully intended to kill." To find Giddings acted with implied malice, the court instructed that: (1) Giddings must have intentionally committed the act causing death; (2) the natural and probable consequences of that act were dangerous to human life; (3) at the time Giddings acted, he knew his act was dangerous to human life; and (4) he deliberately acted with conscious disregard for human life.

Turning to degrees of murder, the trial court explained "[i]f you decide that the defendant [Giddings] committed murder, it is murder in the second degree unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM Instruction 521 [First Degree Murder] and 540A [Felony First Degree Murder]." The trial court instructed the jury that Giddings committed first-degree murder if the People had proven either: (1) that Giddings acted willfully, deliberately, and with premeditation; or (2) that Giddings committed the murder while committing another felony, specifically burglary. To find Giddings guilty of first degree murder while committing burglary, the trial court informed the jury that the prosecution was required to prove that: (1) Giddings committed burglary; (2) Giddings intended to commit burglary; and (3) while committing the burglary, Giddings caused the death of another person. No second degree felony murder instruction was given. Giddings did not object to these instructions.

2. Standard of Review

We review de novo whether a jury instruction correctly stated the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "When considering a claim of instructional error, we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.) "An instruction can only be found to be ambiguous or misleading if, in the context of the entire charge, there is a reasonable likelihood the jury misconstrued or misapplied its words." (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237, citing *People v. Frye* (1998) 18 Cal.4th 894, 957.) Where reasonably possible, jury instructions are interpreted " 'to support the judgment rather than [to] defeat it.' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

3. Analysis

Giddings asks this court to hold that the trial court improperly instructed the jury on the requirements of second degree implied murder even though he failed to object below. " 'Generally, a party may not complain on appeal that an instruction correct in

law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' " (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011–1012.) Forfeiture does not apply, however, if the instruction was an incorrect statement of the law (*id.* at p. 1012), or if the instructional error affected the defendant's substantial rights. (Pen. Code, § 1259; *People v. Ramos, supra,* 163 Cal.App.4th at p. 1087.) While we would ordinarily hold that Giddings forfeited his argument, we will review the substance of his claim because he alleges that the error affected his substantial rights.

"Malice may be either express or implied. It is express when the defendant manifests 'a deliberate intention unlawfully to take away the life of a fellow creature.' ([Pen. Code,] § 188.) It is implied 'when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.' (*Ibid.*)" (*People v. Blakeley* (2000) 23 Cal.4th 82, 87.) In other words, malice is implied when the killing is proximately caused by " ' "an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." ' " (*People v. Knoller* (2007) 41 Cal.4th 139, 152, citing *People v. Phillips* (1966) 64 Cal.2d 574, 587.) Implied malice has " ' "both a physical and a mental component. The physical component is satisfied by the performance of 'an act, the natural consequences of which are dangerous to life.' [Citation.] The mental component is the requirement that the defendant 'knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life.' " ' " (*People v. Bryant* (2013) 56 Cal.4th 959, 965, citing *People v. Chun* (2009) 45 Cal.4th 1172, 1181 (*Chun*).)

Our high court has upheld this definition and the elements of implied malice murder numerous times. (See, e.g., *People v. Bryant, supra,* 56 Cal.4th at p. 965 [interpreting implied malice]; *People v. Cravens* (2012) 53 Cal.4th 500, 507–508 [assessing sufficiency of evidence for the mental and physical components of implied evidence]; *People v. Knoller, supra,* 41 Cal.4th at p. 143 ["In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of

another—no more, and no less."].) It has even concluded that brandishing a firearm may constitute an act that endangers a human life from which malice may be implied. (See, e.g., *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 108–110; *People v. Benson* (1989) 210 Cal.App.3d 1223, 1226, 1228–1231.) And contrary to Giddings's assertion, we have never held that the implied malice doctrine requires an act independent of the assaultive conduct.

Asking us to plow new ground in the area of implied malice, Giddings claims *People v. Ireland* (1969) 70 Cal.2d 522 (*Ireland*), our high court's seminal case on the merger doctrine, supports his argument. In *Ireland*, the defendant shot and killed his wife, and was convicted of second degree murder. (*Ireland*, *supra*, at p. 527.) The trial court instructed the jury on second degree felony murder with assault with a deadly weapon as the underlying felony. Our high court held the instruction was improper, adopting the "so-called 'merger' doctrine," which provides that assaultive-type crimes merge with homicide and cannot serve as the basis for second degree felony murder. (*Id.* at p. 540 & fn. 14.) The doctrine has been extended over the years (*People v. Powell* (2018) 5 Cal.5th 921, 942–944 [tracing evolution of cases extending merger doctrine to first degree felony murder in some circumstances]), but not outside the context of felony murder. In this case, Giddings was charged with and acquitted of first degree felony murder, and as noted above the court did not instruct on second degree felony murder. Thus, the *Ireland* merger doctrine—which is specific to felony murder—is inapposite.

D. Prohibition on Multiple Punishments for Indivisible Conduct

Giddings claims that the consecutive terms to which he was sentenced for his four assault with semi-automatic firearm convictions should be stayed under section 654, which precludes defendants from receiving multiple punishments for indivisible conduct. He further asserts that these convictions do not fall within an exception to section 654 permitting multiple punishments when an act of violence is intended or likely to harm multiple victims.

1. Additional Background

Giddings was sentenced on August 29, 2017. At sentencing, the trial court imposed the mandatory 15 years to life sentence for Giddings's second degree murder conviction followed by a then mandatory consecutive term of 25 years to life for discharging a firearm resulting in death under section 12022.53, subdivision (d). Turning to Giddings's four convictions for assault with a deadly weapon, the court imposed the middle term of six years for the first count of four counts and two years for the three additional counts, each to be served consecutive to the first term, for a total determinate term of 12 years. The trial court then ordered Giddings to serve the determinate sentence of 12 years first followed by a consecutive indeterminate sentence of 40 years to life.

2. Analysis

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

Our Supreme Court has created extra-statutory exceptions to section 654. One such exception arises "when a defendant ' "commits an act of violence with the intent to harm more than one person or by means likely to cause harm to several persons . . . . " ' " (*People v. McFarland* (1989) 47 Cal.3d 798, 803.) For example, if "a defendant, in a single incident, commits vehicular manslaughter as to one victim . . . and drunk driving resulting in injury to a separate victim" (*ibid.*), he may be properly subjected to multiple punishments for the injuries "that result[ ] from the same incident." (*Id.* at p. 804.) " 'The reason for the multiple victim exception is that "when a defendant ' "commits an act of violence with the intent to harm more than one person or by means likely to cause harm to several persons," his greater culpability precludes application of section 654.' " ' " (*People v. Centers* (1999) 73 Cal.App.4th 84, 99.)

The multiple victim exception to section 654 may apply even when a single indivisible course of conduct results in more than one victim. (*People v. Centers*, *supra*,

73 Cal.App.4th at p. 99.) For example, in *People v. Oates* (2004) 32 Cal.4th 1048 (*Oates*), the defendant fired a gun into a group of five people, hitting one person in the leg. (*Oates*, *supra*, 32 Cal.4th at p. 1053.) The defendant was charged with and convicted of five counts of attempted premeditated murder. The attempted premeditated murder counts had alleged section 12022.53, subdivision (d) enhancements, which the jury also found to be true. (*Id.* at pp. 1053–1054.) The trial court stayed all but one of the section 12022.53, subdivision (d) enhancements under section 654. (*Ibid.*) The Court of Appeal also "agreed with defendant that section 654 precludes imposition of *two* subdivision (d) enhancements" based on a single injury. (*Id.* at p. 1054, original italics.) The People sought Supreme Court review of the lower court's ruling on the Penal Code section 654 issue. (*Ibid.*)

The Supreme Court reversed and held that the defendant in *Oates* could be properly punished more than once for the single act causing great bodily injury to two people. (*Oates*, *supra*, 32 Cal.4th at pp. 1062–1069.) In reaching its decision, it explained that "section 654 does not preclude imposition of multiple subdivision (d) enhancements based on the single injury to [the victim]. Under the 'multiple victim' exception to section 654, defendant may be punished for each of the attempted murder offenses he committed when he fired at the . . . group. The subdivision (d) enhancements 'simply follow from' his convictions on those 'substantive offenses.' [Citation.] They 'do not constitute separate crimes or offenses, but simply are the basis for the imposition of additional punishment for the underlying substantive offense.' " (*Oates*, at p. 1066.)

Here, Giddings pointed his firearm at Haug, Starlight, Eskridge, and Steele after fatally shooting Harrison and told them to shut up, sit down, and keep their heads down. Giddings's actions prevented Eskridge and the others from calling for help. Even Steele, who had entered Haug's home with Giddings, whimpered as Giddings pointed the gun at her. As the trial court recognized at sentencing, each person whom Giddings threatened was a separate victim whose cooperation he coerced by pointing his firearm at them. Section 654 "does not bar multiple punishment for violations of the same provision of law" (*People v. Correa* (2012) 54 Cal.4th 331, 344), such as here, where Giddings

assaulted Haug by pointing a firearm at her, Starlight by pointing a firearm at him, Eskridge by pointing a firearm at him, and Steele by pointing a firearm at her. The four assault convictions are punishable separately even if the crimes occurred at roughly the same time.

Relying on *People v. Williams* (2017) 7 Cal.App.5th 644, Giddings, nevertheless, insists that section 654 applies because his act of waiving his gun immediately after firing shots was not "distinguishable as to separate victims." There, the defendants entered cellular phone stores, where they "rob[bed] the victims of cell phones, cash, and other merchandise in the back rooms of the stores." (*People v. Williams*, *supra*, 7 Cal.App.5th at p. 695.) The false imprisonment charges were based on the robbers ordering employees into other rooms or locations within the stores, where they ordered the employees to lie down while they robbed the stores. (*Id.* at p. 695.) They were subsequently convicted of multiple counts of robbery, kidnapping, and false imprisonment. (*Id.* at pp. 652, 666–665.) The trial court declined to stay the defendants' sentences for the false imprisonment. (*Id.* at pp. 694–695.) The Court of Appeal reversed, concluding that the "false imprisonments were part of an indivisible course of conduct with the objective of robbery of merchandise from the backs of the store." (*Id.* at p. 695.)

But *Williams* is distinguishable from this case because Giddings's threats to Haug, Starlight, Eskridge, and Steele were not in furtherance of the murder that he had already completed. Rather, they were an attempt to keep the four witnesses to the murder from doing anything, which gave him time to decide his next course of action.

We are unpersuaded by Giddings's attempts to distinguish *People v. Newman* (2015) 238 Cal.App.4th 103. In that case, the defendant entered a business, demanded and received money, and prevented three customers from leaving the business until he received money and left. (*Id.* at pp. 106–107.) The Court of Appeal held that section 654 did not prohibit multiple punishments when a single act affects multiple victims, such as the business that the defendant was attempting to rob and the bystanders whom the defendant was attempting to stop from leaving in the case before it. (*Id.* at pp. 121–122.)

Giddings contends that the defendant in *Newman* had separate criminal objectives for each set of victims, unlike his case. But this case actually parallels *Newman* as Giddings initially used his gun to kill Harrison before redirecting his gun at Haug, Starlight, Eskridge, and Steele to prevent them from leaving Haug's home or seeking help.

Giddings further argues that the mixed verdict in his case, specifically the acquittal for criminal threats against Eskridge and four convictions for assault with a semiautomatic firearm, weighs in favor of finding that section 654 prohibited consecutive punishments. Giddings relies on *People v. Sok* (2010) 181 Cal.App.4th 88 (*Sok*), to support his claim, but *Sok* does not address whether mixed verdicts impact section 654. In that case, the defendant fired several shots at a vehicle carrying four people and was convicted of attempted murder of two of the four occupants, Vega and Rocha, as well as shooting at an occupied vehicle. (*Sok, supra,* at pp. 92, 100.) The jury hung on the two counts of attempted murder for the other two occupants, neither of whom were injured. (*Id.* at pp. 91–92.) The Court of Appeal held that "[t]he trial court concluded—and the People do not dispute—[the defendant] had but a single criminal intent and objective when he shot into Vega's car and attempted to murder both Rocha and Vega." (*Id.* at p. 100.) The Court of Appeal also concluded that "the [trial] court properly determined under section 654 [that] [the defendant] could not be sentenced for both attempted murder and shooting at an occupied vehicle." (*Id.* at p. 100.) The stay was proper in *Sok* because the defendant had a single criminal intent and objective when he shot into the car and attempted to murder two individuals. (*Ibid.*) But here, no two charges cover the same conduct as alleged against all four victims, like the charge for shooting at an occupied vehicle in *Sok*. *Sok* therefore has no relevance to this case.

Accordingly, because Giddings intended to intimidate several people, making him more culpable than if he had threatened only a single one (*People v. Centers*, *supra*, 73 Cal.App.4th at p. 99), we reject his argument that section 654 prohibits the imposition of consecutive sentences for his four violations of section 245, subdivision (b).

E. New Discretion to Impose Firearm Enhancement

As previously discussed, at the time Giddings was sentenced, imposition of the section 12022.53, subdivision (d), enhancement was mandatory. The law changed, however, on January 1, 2018, and under amended section 12022.53, subdivision (h), a trial court now has discretion "in the interest of justice pursuant to section 1385 and at the time of sentencing, [to] strike or dismiss an enhancement otherwise required to be imposed by this section." Giddings therefore asks that the matter be remanded so the trial court can choose whether to exercise its discretion under the new version of the statute.

There is no dispute that this change applies retroactively. But the Attorney General maintains that remand is unwarranted because there is no plausible, defensible reason why the trial court would, in the interests of justice, sentence appellant as if he had not used a gun to kill Harrison. To this end, the Attorney General contends that enhancement is "presumptively applicable" because the statutes provides that the court "shall" impose it. And he argues the trial court would likely have imposed it because it could only impose another enhancement if its penalty was greater. (Pen. Code, § 12022.53, subd. (j).) The Attorney General further insists that striking the enhancement would not be "in the interests of justice" and that the trial court would be justified in striking the enhancement only if it determined that Giddings should be sentenced as if he had not used a firearm. Finally, the Attorney General contends that, because Giddings choose to arm himself and to shoot Harrison, "[t]here would be no factual basis to pretend, for punitive purposes, that appellant's gun use was not at the violent heart of the case."

We disagree with the Attorney General that remand would necessarily be futile. Here, the trial court gave no indication about whether it would impose the then-mandatory enhancement if it had discretion to do so. Most cases that have considered the propriety of a limited remand, including this court, have concluded that where a trial court has never considered the exercise of discretion it has newly acquired, an appellate court should not, in the absence of extraordinary circumstances, hazard a guess as to how such discretion would have been exercised. (*See, e.g.*, *People v. McDaniels* (2018) 22

Cal.App.5th 420, 427.) The Attorney General's arguments would be better addressed before the trial court during a resentencing hearing and do not amount to the extraordinary circumstances necessary for this court to decline to remand Giddings's case. We therefore will order a limited remand.

III. CONCLUSION

The matter is remanded to the trial court with directions to decide whether, under section 12022.53, subdivision (h), as amended by Senate Bill No. 620, to strike the enhancement imposed and, if the trial court decides to do so, to resentence Giddings accordingly. In all other respects, the judgment is affirmed.

_____
STREETER, J.

We concur:

_____
POLLAK, P.J.

_____
TUCHER, J.

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